

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

60427

FILE: B-183164

DATE: January 27, 1976

MATTER OF: Henry Spen & Company, Inc.

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DIGEST:

1. Agency's waiver of first article testing requirement in accordance with RFP provision for offeror after receipt of best and final offers did not give offeror opportunity to modify or revise its proposal; therefore agency was not required to reopen negotiations with other offerors.
2. Prospective contractor's responsibility should be measured with respect to information of record at time of award. Agency's reversal of its nonresponsibility determination as to low offeror, based on financial information brought to its attention was proper.

Henry Spen & Company, Inc. (Spen) protests the award of a contract to General Aviation Industries, Inc. (General) under request for proposals (RFP) DSA-400-75-R-0040, issued on September 16, 1974, by the Defense General Supply Center, Richmond, Virginia, for 49 compressed gas cylinder trailers and related technical data. Spen contends that the contracting officer failed to treat equally all those offerors whose proposals were within the competitive range in that the contracting officer failed to notify Spen that the RFP first article test requirement would be waived for General. Spen also maintains that the award to General was based on a specious agency determination of urgency. However, for the reasons stated below, we find no merit in Spen's contentions.

Initial proposals were submitted by four offerors. The low offer was submitted by General, and Spen submitted the second low offer. General indicated in its proposal that it had supplied trailers under an earlier contract and offered a reduction in price of \$50.00 per unit if the requirement for first article approval were waived.

On November 5, 1974, negotiations were opened with General and Spen after the contracting officer determined that the other two offerors were not within the competitive range. Both Spen and General were requested to submit their best and final offers by November 8. No changes were made by either firm as a result of the discussions.

On November 6, 1974, the contracting officer requested pre-award surveys on both firms. On December 9, 1974, the Dallas Region of the Defense Contract Administration Services Region (DCASR) forwarded a report recommending that no award be made to General because of unsatisfactory ratings with respect to financial capability, quality assurance capability, and General's ability to meet the delivery schedule. In the latter two areas, the report's findings were related only to General's ability to comply with the first article approval requirements of the RFP. It was reported that General did not possess the necessary inspection and test equipment required for first article testing and it could not meet the delivery requirements of the RFP unless first article requirements were waived. Acting on the recommendation of the pre-award survey report, the contracting officer determined General to be non-responsible. However, since it had been determined that the requirement for first article approval could be waived if an award were made to General, the contracting officer's determination rested solely on the ground that the firm lacked the financial capability to perform a contract resulting from the solicitation. On December 20, 1974, the question of General's responsibility was referred to the SBA and on January 21, 1975, the contracting officer was notified that the SBA had refused to issue a COC.

Meanwhile, on January 6, 1975, DCASR, New York, forwarded its report on Spen recommending no award. The survey found that Spen lacked the financial capability to perform the contemplated contract and lacked the ability to meet the required delivery schedule. On January 22, 1975, the contracting officer, after being advised of the SBA's action with respect to the low offeror, determined Spen nonresponsible and referred the matter to the SBA.

Soon thereafter, it was learned by the contracting officer that a \$50,000 line of credit obtained by General from the City National Bank, Fort Worth, Texas, had not been considered by the SBA in acting on that firm's request for a COC because

the firm had failed to meet the SBA deadline for submitting evidence of its financial capability. Therefore, the contracting officer decided to reconsider his earlier determination of non-responsibility, and he requested DCASR to re-survey the firm. Since a reversal of his previous determination that General was not a responsible offeror would mean that Spen would no longer be in line for an award, the contracting officer asked the SBA to suspend action on Spen's request for a COC.

On February 18, 1975, DCASR, Dallas, forwarded its re-survey report. General received satisfactory ratings in the areas of financial capability and quality assurance capability. However, a recommendation of "no award" was again made based on DCASR's finding that General could not meet the delivery schedule without a waiver of the first article requirements. The report stated that an award "would be in order" in the event first article requirements were waived. Since the agency determined that the requirements for first article approval could be waived for General the contracting officer concluded that General was a responsible offeror.

Spen originally protested to this Office against any award under the subject RFP by telefax dated February 5, 1975, stating that the procuring activity failed to follow all applicable regulations and that the details would follow. This protest was dismissed by letter dated April 22, 1975, because Spen failed to supply any of the details of its protest. Apparently upon being advised of the award of the contract to General on April 21, Spen again submitted a protest by telefax dated April 21 which protest did not reach the cognizant personnel in this Office before our dismissal letter of April 22, was sent to Spen. This telefax also stated that details of the protest would follow. Initial details of the protest were submitted to this Office by letter of May 9, 1975. In the meantime, award had been made to General on April 21, 1975, notwithstanding the pending protest, due to urgency.

In its letter of May 9, Spen contended that the contracting officer's failure to pursue a COC determination applicable to Spen from the SBA negates the finding that Spen was non-responsible. However, since the administrative report filed thereafter revealed that the contract was awarded to General because that offeror was low as to price and because it was found to be responsible, Spen thereafter contended that it should have been informed of the agency's waiver of the first article test requirements for General and been given the opportunity to conduct further negotiations with the agency; since the contracting officer "was actively supporting efforts to reverse the negative survey of 'General'."

We cannot agree. The RFP provided at paragraph C44 that "The Government reserves the right to waive the requirement herein for first article approval tests to those offerors offering a product which has been previously furnished and has been accepted by the Government." General specified in its offer that it had previously furnished this item while Spen's offer did not contain any such statement. By exercising its right to waive the first article testing requirement for General the contracting officer did not give General the opportunity to modify or revise its proposal, which we have identified as the standard for determining whether negotiation must be reopened, 51 Comp. Gen. 479, 481 (1972), but rather he merely acted in accordance with the express terms of the RFP.

Moreover, we have held that a prospective contractor's responsibility should be measured with respect to information of record at the time of award, Radiation Systems, Inc., B-180268, July 29, 1974, 74-2 CPD 65; 51 Comp. Gen. 448, 452 (1972). It is clear, therefore, that the contracting officer's consideration of financial information brought to its attention after the action of initial finding of nonresponsibility, but prior to the award of any contract, was proper. Similarly we see nothing improper in the contracting officer's withdrawal from SBA of the referral of Spen for a COC when he determined that Spen was no longer the prospective contractor.

Finally Spen disputes DSA's determination to award the contract to General prior to resolution of its protest. Spen alleges that since it is able to make delivery more quickly than General the award to that firm based on an urgency determination was improper.

The agency determined on April 18, 1975, pursuant to Armed Services Procurement Regulation (ASPR) 3-508.2 (1975 ed.), that the combination of urgent requirements for the subject items and the impending expiration of the May 5 acceptance period for the offers justified award to General as the low offeror notwithstanding the pending protest and without affording Spen the opportunity to challenge that firm's size status as required by ASPR 3-508.2(b). As stated, the contract was awarded to General on April 21, 1975. In view of our conclusion on the merits of the protest, and since it has not been alleged that General is not a small business, we find no reason to question this aspect of the award proceedings.

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Accordingly, the protest is denied.


Deputy Comptroller General
of the United States